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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-895

RATEPAYERS FIGHT BACK,

PETITIONER

V.

MIDDLE SOUTH ENERGY, INC.,
ARKANSAS POWER & LIGHT CO.,
ARKANSAS PUBLIC SERVICE,
COMMISSION ATTORNEY GENERAL
OF ARKANSAS,

RESPONDENTS

MEMORANDUM OF RESPONDENT ARKANSAS PUBLIC SERVICE COMMISSION IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

Introduction	1
Respondent's Statement of Position	4
Conclusion	19

INTRODUCTION

Respondent Arkansas Public Service Commission (hereafter "the Commission" or "APSC") herewith files its memorandum of response to the prayer of Petitioner that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals entered on August 23, 1985. For the purpose of this response and in explanation of its position, the Commission accepts and adopts by reference the jurisdictional statement, statement of constitutional and statutory provisions involved, statement of the case, and the reasons for granting the writ contained in the Petition. As explained more fully below, the Commission questions its ability to take a position in support of the granting of the petition or to file a petition itself, though it might wish to do so in

normal circumstances. But, having been made a respondent through the actions of Petitioner RFB and as the party enjoined by the order of the District Court, as affirmed by the Court of Appeals, the Commission must affirmatively declare in this response that the questions presented by the petition are of such import to the people of Arkansas and have such implications for the laws of Arkansas that, in the event the Court should grant the Petition, the Commission would have no choice but to reassert the legal positions it has consistently taken in this litigation since it was sued by respondent Middle South Energy in August 1984.

The Rules of the Supreme Court do not address in specific terms the question whether a respondent may preserve its rights to brief and make oral argument

without taking a definite position for or against the granting of a petition for a writ of certiorari. In light of this uncertainty in the Rules, if the Commission, as a respondent herein, is required by the Rules of the Court to declare either support for or opposition to the Petition at this time in order to preserve its rights to brief and argue the case, should certiorari be granted on the basis of the RFB Petition, then the Commission urges this honorable Court to consider this memorandum to be in support of rather than in opposition to the granting of the petition. The Commission believes that the statement of position which follows will enlighten the Court as to the unusual circumstances surrounding this case and the reasons why the Commission must couch its position on the granting of the petition in the alternative.

RESPONDENT'S STATEMENT OF POSITION

Following the August 23, 1985, affirmance of the District Court decision by the three-judge panel, the APSC on September 5, 1985, filed a Petition for Rehearing by the Panel and Suggestion for Rehearing En Banc by the Eighth Circuit. (APSC Ex. A). During the last week of August and first week of September 1985, representatives of the Staff of the Commission, the Attorney General of Arkansas, and Arkansas Power & Light Co. (AP&L), as well as other industrial intervenors who were parties to a vigorously contested AP&L retail rate case pending before the APSC in its Docket No. 84-249-U, entered into intensive negotiations which resulted in the submission to the APSC on September 5, 1985, of a Stipulation and Settlement Agreement (APSC Ex. B). After

several days of deliberation on the proffered settlement, the Commission on September 9, 1985, entered its Order No. 26 in Docket No. 84-249-U (APSC Ex. C), approving the stipulation and settlement agreement in the public interest. Retail rates reflecting the terms of the settlement became effective on and after September 9, 1985.

Paragraph 7 of the approved Stipulation and Settlement Agreement (APSC Ex. B at pp. 30-32) provided that all of the parties to the settlement negotiations (APSC Staff, Arkansas Electric Energy Consumers, Southern Cotton Ginners Association, Attorney General of Arkansas, Reynolds Metals Company, and AP&L) "except AP&L agree to take such action as may be necessary to voluntarily dismiss without prejudice, terminate or withdraw their interventions

in" twelve state and federal regulatory and court proceedings then pending which involved the APSC and AP&L, including the case at bar herein. (Id. Emphasis added.)

As also provided by Paragraph 7 of the Settlement Agreement, AP&L agreed "to take such action as may be necessary to voluntarily dismiss without prejudice, or terminate" litigation it had brought against the APSC in state and federal court in three other cases. (Id.) The Settlement Agreement further provided:

> Each of the parties agrees that it will not refile or reinstitute such litigation or other litigation raising similar issues on any of the same facts so long as this Agreement remains in effect. The parties agree that this Settlement Agreement is expressly contingent upon the Commission making the necessary findings in its order approving this Settlement Agreement that it will (a) voluntarily dismiss without prejudice, terminate, or withdraw its intervention in the litigation listed above in which the Commission is a party or

> participant and that it will not refile or reinstitute such litigation as long as this Agreement remains in effect, and (b) take such action as may be necessary to close the Commission Dockets listed above. The continued effectiveness of this Settlement Agreement is also expressly contingent upon the Commission taking such action as may be necessary to terminate or dismiss such proceedings. . . .

Id.

Although the Commission, as an institution of state government, and its commissioners, as individuals, were not participants in or "parties" to the settlement negotiations or the Stipulation and Settlement Agreement,[1] the APSC in furtherance of its Order No. 26 approving the settlement, withdrew

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[1]The Commission's Staff, under the direction of the Commission's Executive Director, was a party to the rate case and the negotiations leading to the settlement; the Staff and its Director acted without the direction or involvement of the commissioners.

the Petition for Rehearing it had filed with the Court of Appeals on September 5, 1985 (APSC Ex. C).

Petitioner Ratepayers Fight Back (RFB) was not a party to either AP&L's retail rate case (APSC Docket No. 84-249-U) or the Stipulation and Settlement Agreement approved by the Commission in resolution of that case.

Consequently, RFB was not and is not bound by the terms of the settlement or the APSC Order No. 26 approving it insofar as they pertained to dismissal of certain legal proceedings and the termination of litigation involving AP&L and the APSC. Thus, on November 21, 1985, RFB filed the instant petition for a writ of certiorari, which was served on the APSC on November 22, 1985.

Although not by definition a "party" to the Stipulation and Settlement

Agreement, the APSC considers that its withdrawal of the Petition for Rehearing by the Court of Appeals was an action consistent with the terms and spirit of the approved settlement.

However, in accepting the Stipulation and Settlement Agreement, the Commission expressly did not agree to abdicate its statutory duty to regulate AP&L or to shirk its responsibility to set just and reasonable rates by interpreting and enforcing the laws of Arkansas. (See APSC Ex. C at p. 41). To the extent that the performance of that responsibility entails responding to legal proceedings initiated by others, such as petitioner herein, the APSC does not view the expression of its position as violative of either the spirit or the letter of the Stipulation and Settlement Agreement or its order approving it. Nothing the APSC

could do or has done since its approval of the Settlement Agreement on September 9, 1985, could have negated the right of Petitioner RFB to pursue its lawful right to seek review by this honorable Court of the Court of Appeals decision. The Commission simply has no power to "dismiss" or terminate" the litigation in this case.

In this case the Commission was the party enjoined by the District Court to terminate all proceedings involving the review of certain financial agreements entered into by MSE and AP&L. Notwithstanding the unique posture in which the APSC now finds itself -- having with openly-stated reluctance approved the retail rate case settlement agreement and acted in furtherance of the settlement by withdrawing its previously-filed Petition for Rehearing

by the Court of Appeals -- there is no doubt that the Commission and the State of Arkansas have a direct and palpable interest in the outcome of this litigation if certiorari should be granted. For example, while it is clear that under the current state of the law in the Eighth Circuit, the APSC may not resume hearings or proceedings in its now closed Show-Cause docket which was enjoined by the District Court,[2]

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[2] See APSC Ex. C at 19, in which the Commission discussed the Hobson's choice with which it was presented in considering the settlement agreement: "Although the Commission believes that interpretations of the courts in the Eighth Circuit do not constitute the appropriate legal standard, it must acknowledge them and must recognize the dangers inherent in the applications of these standards to the actions of this Commission on the issues before it. Therefore, in order to assure some protection to Arkansas ratepayers, rather than risk the strong possibility of no protection for those ratepayers, the Commission has little choice but to accept the Stipulation as submitted." (Emphasis in original.)

nothing would "legally" preclude the APSC from exercising the option to reopen that docket, which option would be created in the event this Court were to grant certiorari and reverse the decision of the Eighth Circuit.[3] Similarly, while under the current state of the law the Commission would not undertake any new investigations or open new dockets which violate the teachings of the Court of Appeals, nothing "legally" would prevent the Commission from engaging in such proceedings in the future if this court

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[3]The Commission wishes it to be clearly understood that, in discussing the option that would be created if the Court of Appeals were to be reversed, it is in no way signalling that it would reopen the Show-Cause docket. Any decision on that point would, of course, depend entirely upon the course of future events, and the Commission would take into account the terms of the Stipulation and Settlement Agreement, as well as its Order No. 26 approving the settlement, in evaluating such an option.

were to grant certiorari and reverse the Eighth Circuit. The preceding points are made in anticipation of arguments from respondents AP&L and MSE that the issues raised by petitioner herein are moot, owing to the fact that the Commission has, in the wake of its approval of the settlement agreement, closed certain dockets, including the enjoined Show-Cause proceeding. In summary, more is at stake here than the specific Show-Cause proceedings which were enjoined by the District Court. The Commission, by accepting a settlement in an AP&L retail rate case, did not erase from the laws of Arkansas those statutes which require it to review and approve the issuance by public utilities of stocks, bonds, and evidence of indebtedness. Thus, even if this Court were to change the current state of the

law by reversing the Court of Appeals, and thereafter the APSC decided not to reopen the show-cause docket involving AP&L, the decision of the Supreme Court would have nonetheless preserved to the Commission and the people of Arkansas those laws enacted by its legislature calling for APSC scrutiny of the financial obligations and securities of all public utilities operating in the state. In summary, the APSC does not believe that all legal issues raised by the petition are moot simply because a settlement agreement was reached by the parties to a specific AP&L rate case and approved by the Commission.

To underscore the anomalous nature of this case, it need only be pointed out that AP&L is not bound to silence on the petition by the settlement agreement, nor is it obligated in any way to refrain

from opposing the granting of a writ, which it can be expected to do. Neither is MSE precluded from taking any position it chooses, since it was not a party to either the retail AP&L rate case or the settlement agreement.

Nothing in the Stipulation and Settlement Agreement proscribes APSC participation in ongoing litigation or requires the Commission to stand silent in this case in which it remains the enjoined Defendant.[4] The Commission has not "refiled" or "reinstituted" this litigation; the litigation has simply not been concluded, owing to the independent actions of a third party not bound by the settlement agreement, the APSC order

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[4]Nor does the settlement purport to require the Commission to raise no defense to future actions seeking to enjoin APSC enforcement of the statutes in question.

approving it, or the Commission's decision to withdraw its request for rehearing by the court of appeals. Nor is the pursuit of review by petitioner a "refiling" or "reinstitution" of litigation, but rather it constitutes the timely and regular exercise by RFB of its lawful right to seek review by this court.

As both a respondent herein and the party enjoined by order of the District Court, as affirmed by the Eighth Circuit, the APSC is inextricably involved in this litigation notwithstanding its approval of the settlement. The Commission would have no choice but to enunciate its position on the questions presented and defend its jurisdiction in the interests of the citizens of Arkansas, should the Court grant the Petition for a writ of certiorari. While the Commission believes that the letter and the spirit

of the Settlement Agreement and its order approving it would have precluded the APSC itself from filing a Petition for a writ of certiorari, it would be nonsensical to think that if the writ were granted only the plaintiff/ plaintiff-intervenor (MSE/AP&L) and the defendant-intervenor (RFB) could file briefs and make oral argument concerning laws of the State of Arkansas which the defendant (APSC) is statutorily charged to interpret and enforce.

In summary, the APSC considers it its duty and obligation, now that the litigation has been resumed through the independent actions of a third party, to respond to the petition by stating it will reassert its original positions in this case on brief and in oral arguments if the Court grants the Petition. To pursue other courses, such as waiver of

participation, filing in opposition to the Petition, or total inaction, would be irresponsible in light of the Commission's statutory duties and obligations. Now that the Commission is faced with the fact that litigation filed against it by MSE and AP&L may have renewed vitality, the APSC can do no less than declare that, should certiorori be granted, it will articulate and defend its positions on the questions presented, which the Commission cannot deny are questions of exceptional public importance.[5]

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[5]The Commission notes that on December 9, 1985, the Supreme Court agreed to hear argument in Nantahala Power & Light Co. v. North Carolina Utilities Commission, Docket No. 85-568, which appears to present related and similar issues involving conflicting federal and state jurisdiction over electric utilities.

CONCLUSION

For the foregoing reasons, the APSC prays that this honorable Court accept this statement of position and permit all parties to participate in briefing and oral argument of the questions presented, should the writ be granted. In the alternative, if the Commission must under the Rules of the Court take a position in support of or in opposition to the Petition in order to preserve its rights to participate in briefing and oral argument, the Commission prays that the Court consider this reponse to be in support of the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

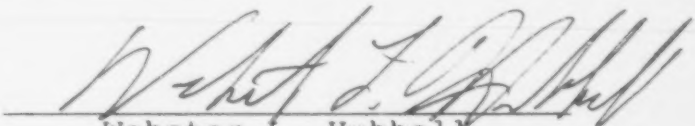
I, Webster L. Hubbell, do hereby certify that I served a true and correct copy of the above and foregoing Petition For a Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit, with Appendix, by regular mail, postage prepaid, on the 21st day of November, 1985, to the following:

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Webster L. Hubbell

AFFIDAVIT

STATE OF ARKANSAS)
) ss.
COUNTY OF PULASKI)

I, Webster L. Hubbell, after being duly sworn state as follows:

1. I am a member in good standing of the United States Supreme Court Bar.

2. I am a partner in the Rose Law Firm, counsel of record, for The Arkansas Public Service Commission.

3. On Thursday, December 12, 1985, an original and forty (40) copies of the Memorandum of Respondent Arkansas Public Service Commission in Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit was forwarded to the Honorable Alexander L. Stevens, Clerk, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543 by Federal Express mail.

WITNESS my hand on this 12th day of December, 1985.

Webster L. Hubbell
Counsel of Record

ACKNOWLEDGMENT

STATE OF ARKANSAS)
) ss.
COUNTY OF PULASKI)

On this day before me, a Notary Public, duly commissioned, qualified and acting within and for the State and County aforesaid, appeared in person, Webster L. Hubbell, to me well known, and stated that he had executed the foregoing instrument for the consideration and purposes therein mentioned and set forth.

WITNESS my hand and seal as such Notary Public on this 13th day of December, 1985.

Martha Williamson
Notary Public

My Commission Expires:

9-17-90